

## ESTATE OF ELLA SARAH CASE BARNES

IBIA 88-37

Decided February 15, 1989

Appeal from a July 25, 1988, order denying rehearing issued by Administrative Law Judge Keith L. Burrowes in Indian Probate IP BI 66A 88.

Affirmed.

1. Indian Probate: Inheriting: Non-Indian

Because 25 U.S.C. § 181 (1982) applies only to tribal property, it does not prevent a non-Indian from receiving individually owned trust or restricted property either as an heir or devisee.

2. Indian Probate: Life Estates

Title to property subject to a life estate is in the remaindermen, not in the life tenant.

3. Indian Probate: Wills: Generally

Intent alone is not sufficient to create, alter, or revoke an Indian will.

4. Indian Probate: Trust Property--Indians: Leases and Permits: Generally

Under 25 CFR 162.2(a)(3), the Department is authorized to grant leases on individually owned land on behalf of the undetermined heirs of a decedent's estate. Until the completion of probate, including all appeals proceedings, the heirs of a decedent's estate have not been finally determined.

APPEARANCES: Sherman P. Hawkins, pro se; Cecil G. Hawkins, pro se.

### OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On August 29, 1988, the Board of Indian Appeals (Board) received a notice of appeal from Sherman P. Hawkins (appellant), seeking review of a July 25, 1988, order denying rehearing issued by Administrative Law Judge Keith L. Burrowes in the estate of Ella Sarah Case Barnes (decedent). For the reasons discussed below, the Board affirms that order.

### Background

Decedent, Allottee 3124 of the Crow Indian Reservation in the State of Montana, was born January 31, 1918, and died testate on September 6, 1986. A hearing to probate her trust or restricted estate was held before Judge Burrowes on May 31, 1988. Only appellee Cecil G. Hawkins was present at that hearing. 1/ The record contains a will executed by decedent on February 6, 1970.

In his June 7, 1988, order approving will, Judge Burrowes found that if decedent had died intestate, her heirs would have been her non-Indian surviving spouse, Russell Barnes, and her four children by a previous marriage, Leona J. Hawkins Chapin, appellee, appellant, and Della B. Hawkins Burnett. However, Judge Burrowes found that the term of decedent's will provided for a different distribution of her trust or restricted property. 2/ In accordance with Judge Burrowes' interpretation of the will, Russell Barnes received a life estate in all of decedent's trust or restricted property, with the remainder interest passing equally to her four children.

Appellant filed a petition for rehearing on July 11, 1988. By order dated July 25, 1988, Judge Burrowes denied the motion.

Appellant's appeal to the Board was received on August 29, 1988. After receipt of the probate record, the appeal was docketed by Board order dated November 14, 1988. Both appellant and appellee filed briefs on appeal.

### Discussion and Conclusions

On appeal, appellant argues: (1) he was not given notice of the original probate hearing and so was denied the opportunity to appear; (2) Judge Burrowes incorrectly used Montana State law in determining that Barnes was decedent's heir, thereby creating a false presumption that Barnes could be an heir although no Federal law or statute allows a non-Indian to be an heir to trust or restricted property by marriage; (3) Judge Burrowes should have applied 25 U.S.C. § 181 (1982) 3/ and found that Barnes was ineligible to inherit trust or restricted property; (4) Judge Burrowes has in effect ceded

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1/ Although a transcript of the hearing was not prepared, the Board finds that no testimony presented at the hearing is challenged on appeal, and that, therefore, a decision can be rendered without a transcript.

Under 43 CFR 4.236(b), if a transcript is not made from the verbatim recording of a probate hearing, the recording itself must be retained in the office of the Administrative Law Judge until the time allowed for rehearing and appeal has expired.

2/ Section 2 of decedent's will provides: "I give, devise, and bequeath to my husband, Russell Eugene Barnes, non-Indian, a life estate in my own allotment," with the remainder interest passing equally to her four children named above. The residuary clause, the only other dispositive clause in the will, states that all the rest and residue of decedent's estate "[s]hall be divided as provided for in the second devise of this Last Will and Testament."

3/ All further citations to the United States Code are to the 1982 edition.

decedent's trust or restricted estate away from the reservation and allowed it to be encumbered and alienated contrary to 25 U.S.C. §§ 464 and 1322(b); (5) the will should have been disapproved as improvident because decedent had intended to give Barnes only a house to live in, not all of her trust or restricted property; and (6) the Superintendent, Crow Agency, Bureau of Indian Affairs (Superintendent), violated the rights of decedent's heirs by leasing part of the estate while the matter was in probate.

Appellant contends that the Judges order must be overturned because he did not receive notice of the original probate hearing. The record shows that appellant was mailed a copy of the notice and the notice was not returned by the Postal Service. Under such circumstances, service is presumed. See Estate of Lucy Buffalo Little Coyote (a.k.a. Thyra Redbird), 17 IBIA 31, 33 (1989); Estate of Andrew Jackson, 12 IBIA 39 (1983). Furthermore, appellant has stated that through the rehearing and appeal process, he has raised all the issues he would have raised at the original hearing. Because of the thorough consideration of those issues by both Judge Burrowes and the Board, appellant has received an opportunity to express his objections.

In his June 7, 1988, order approving will, Judge Burrowes included a statement as to the persons who would have been decedent's heirs had she died without a will. Contrary to appellant's allegations, the Judge properly based this finding on Montana State laws of intestate succession. See 25 U.S.C. §§ 348 and 372; 4/ Estate of Reuben Mesteth, 16 IBIA 148 (1988), and cases cited therein. Furthermore, 43 CFR 4.240(a)(1) requires a finding as to a decedent's intestate heirs in each Departmental probate decision, even when a valid will exists:

(a) The administrative law judge shall decide the issues of fact and law involved in the proceedings and shall incorporate in his decision:

(1) In all cases, the names, birth dates, relationships to the decedent, and shares of heirs with citations to the law of descent and distribution in accordance with which the decision is made; or the fact that the decedent died leaving no legal heirs. [Emphasis added.]

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4/ Section 348 states in pertinent part: "Provided, That the law of descent and partition in the State or Territory where such lands are situated shall apply thereto after [trust] patents have been executed and delivered."

Section 372 states in pertinent part:

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

Although not essential to the ultimate decision when a will is approved, the statement of the persons who would have been a decedent's heirs in the absence of a will is used by BIA and the tribes for informational, historical, and record-keeping purposes.

Accordingly, Judge Burrowes' statement of the persons who would have been decedent's heirs did not create a false presumption that Barnes was eligible to inherit her trust or restricted property. Under the circumstances of this case and Montana State law, Barnes was eligible to inherit from decedent, despite the fact that he was non-Indian, unless prevented from inheriting by a superseding Federal law. Cf., e.g., Estate of Pansy Jeanette (Sparkman) Oyler, 16 IBIA 45 (1988); Estate of Louise Amiotte Lajtay, 12 IBIA 229 (1984); and Estate of Alice N. Whiteman Rides Pretty Hayden, 12 IBIA 203 (1984) (cases in which non-Indians could inherit) with Estate of Mary Ann Snohomish Cladoosby, 15 IBIA 203, 94 I.D. 199 (1987); and Estates of Edwin (Edward) J. Scarborough and Nora Scarborough Brignone, 11 IBIA 179, 183 n.7 (1983) (cases in which non-Indians could not receive certain trust or restricted property).

[1] Appellant argues that 25 U.S.C. § 181 prohibits Barnes from acquiring any interest in decedent's trust or restricted property. Section 181 states in its entirety:

No white man, not otherwise a member of any tribe of Indians, who may after August 9, 1888, marry an Indian woman, member of any Indian tribe in the United States, or any of its Territories except the Five Civilized Tribes in the Indian Territory, shall by such marriage after August 9, 1888, acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled.

As Judge Burrowes correctly held in denying rehearing, section 181 applies to tribal property, not to property individually owned by Indians. See, e.g., Sheppard v. Sheppard, 655 P.2d 895, 905, 104 Idaho 1 (1982) ("Trust property is not tribal property, it is the property of an individual Indian"); Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.), 471-574, 605-38. Accordingly, that section does not bar inheritance by Barnes.

[2] Appellant next argues that, because decedent's trust or restricted property has passed to a non-Indian, it has in effect been ceded away from the reservation in violation of 25 U.S.C. §§ 464 and 1322(b). <sup>5/</sup> Assuming

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<sup>5/</sup> The portion of section 464 to which appellant apparently refers is:

"Except as provided in sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or shares in the assets of any Indian tribe or corporation organized thereunder, shall be made or approved."

The cited sections are part of the Indian Reorganization Act of 1934 (IRA), and apply only to those tribes which did not reject the act's provisions. See 15 U.S.C. § 478. The Crow Tribe rejected the IRA in an election held on May 18, 1935.

for the sake of discussion that both of these sections apply to decedent's trust or restricted property in the way appellant argues, his contention is still without merit because Barnes was found to receive only a life estate. A life estate is a right to use property, but does not convey title to that property. Title to the property is in the remaindermen, *i.e.*, those persons to whom the property passes upon the expiration of the life estate. In this case, title to decedent's trust or restricted property is in her Indian children, subject to Barnes' right to use the property during his lifetime. The property has not in any way been "ceded away from the reservation."

[3] Appellant's argument that decedent intended to give Barnes only the right to live in her house is apparently based upon a 1986 codicil to her will in which she gave instructions regarding the running of her ranch after her death. The codicil indicates it was written before decedent left on a vacation, and was to be in effect for only 3 weeks. <sup>6/</sup> Appellant further alleges that decedent had intended to change her will, apparently in accordance with the terms set forth in the codicil.

Assuming, again, for the purposes of discussion, that decedent intended to alter her will, intent alone has never been held sufficient to create, alter, or revoke an Indian will. Estate of Grace Dion Antelope Horse Ring, 12 IBIA 232, 236 (1984); Estate of Helen Ward Willey, 11 IBIA 43, 48-49 (1983). Because decedent took no action to change her will, the Department is without authority to disapprove that will based upon appellant's allegations concerning her intent.

[4] Finally, appellant argues that the Superintendent violated the rights of the heirs by leasing decedent's trust or restricted property while probate was pending. Under 25 CFR 162.2(a)(3), the Superintendent, as the delegated representative of the Secretary, has authority to "grant leases on individually owned land on behalf of: \* \* \* (3) the undetermined heirs of a decedent's estate." Until the completion of probate, including all appeals proceedings, the heirs of decedent's estate have not been finally determined,

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fn. 5 (continued)

Section 1322(b) is part of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341. Section 1322(a) provides for the assumption of civil jurisdiction by states over certain enumerated causes of action arising in Indian country. Such jurisdiction can be assumed only with the consent of the affected tribe. Section 1322(b) states:

"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

<sup>6/</sup> A copy of the codicil appears in the record. There has been no showing that the codicil was validly executed.

and the Superintendent has authority to lease the land in the estate. Estate of Stella Red Star/Swift Bird, 14 IBIA 140, 148 n.8 (1986); Estate of Frances Ingeborg Conger (Ford), 13 IBIA 296, 300-01, 92 I.D. 512, 514 (1985); Sievers v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 291, 294 (1985). 7/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 25, 1988, decision of Judge Burrowes is affirmed. 8/

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Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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Anita Vogt  
Administrative Judge

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7/ The record indicates that both appellant and appellee disagreed with certain circumstances concerning the leasing of decedent's trust or restricted property and corresponded with the Superintendent about their objections. These problems, although undoubtedly of great significance to the parties, are not properly before the Board in this appeal.

8/ Appellant filed a motion to dismiss appellee's reply brief. The grounds for dismissal raised were considered and found to be without merit.